by Section 271(c)(1(A).[52] Such additional charges, or other unstated terms and conditions, could easily thwart the competitive provision of local exchange service by a new market entrant.

The same concerns also apply to disclaimers and reformation clauses. Inclusion in a network access/interconnection agreement of provisions providing for modifications predicated on the outcome of appeals or subsequent regulatory actions suggest that at least one of the parties to the agreement does not view it as complete and fully binding. Language which implies that an agreement was not voluntarily executed suggests that a party is reserving its right to disclaim the obligations it has undertaken therein. A BOC must either acknowledge that the network access/interconnection agreement upon which it is relying to satisfy Section 271(c)(1)(A) is binding upon it or forego the benefit of using that agreement to justify its application for "in-region," interLATA authority.

e. Is Providing Access and Interconnection

Sections 271(c)(1)(A) and (2)(A) mandate that a BOC must not only have "entered into" one or more network access/interconnection agreements, but must be "providing access and interconnection to its network facilities."[53] In other words, the network access/interconnection agreements upon which the applying BOC relies must have been implemented and the facilities-based competitors with whom those agreements were struck must have initiated commercial operation on an interconnected basis. This reading is confirmed not only by the Congress' use of the present tense -- *i.e.,* "is providing" -- in Sections 271(c)(1)(A) and (c)(2)(A), but the Conference Committee's declaration that:

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[52] 47 U.S.C. § 271(c)(1)(A).

[53] 47 U.S.C. § 271(c)(1)(A), (c)(2)(A).

> The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational."[54]

This approach, of course, stands in stark contrast with the "Track B" requirement that the BOC need merely be "offering access and interconnection."[55]

Certainly, the conduct of a test, a trial or a demonstration does not render a competitor "operational." Such activities are undertaken as a precursor to commercial operation in order to identify and remedy problems and to ensure that network access and interconnection are not only available at all necessary points, but are fully functional. Likewise, a competitor should not be deemed to be "operational" until the network access/interconnection agreement under which it will operate has been fully implemented. Piecemeal or partial implementation of an agreement does not allow for viable commercial operation. Finally, constraints on capacity or other limitations which impact service quality preclude full commercial operation and thus, if present, preclude a finding that the BOC has satisfied the requirement that it must be providing access and interconnection to its network facilities.

2. Full Implementation of the "Competitive Checklist"

A BOC that seeks "in-region," interLATA authority under either "Track A" or "Track B" must demonstrate compliance with each of the elements included in the Section 271(c)(2)(B) 14-point "competitive checklist."[56] A BOC will only be deemed to be providing under "Track A" or generally offering under "Track B" network access and interconnection if it

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[54] Joint Explanatory Statement at 148.

[55] 47 U.S.C. § 271(c)(2)(A)(i)(II).

[56] 47 U.S.C. § 271(d)(3)(A)(i).

has "fully implemented the competitive checklist."[57] Full implementation in turn means that each of the fourteen "competitive checklist" items must be practically available and adequately supported. Practical availability means that each item can be purchased and utilized by a new market entrant throughout the State and in quantities adequate to meet its needs. If a new market entrant is constrained in the geographic locations in which it can operate because checklist items are not ubiquitously available, the competitive checklist has not been fully implemented. If a new market entrant cannot satisfy the needs of its customers because of inadequate capacity or deficient operational support, the competitive checklist has not been fully implemented.

A BOC must be able to timely and competently provision, maintain and repair any and all services and facilities requested by a competitor, which means that its operational support systems must be fully tested and adequate to accommodate a high level of demand. As noted previously, the Commission has acknowledged that:

> [I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.[58]

Thus, the Commission has concluded that "it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market."[59] Or as succinctly couched by Ameritech, "[o]perational interfaces are essential to promote viable competitive entry."[60] For this reason, the Commission mandated that each

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[57] Id.

[58] Local Competition First Report and Order, FCC 96-325 at ¶ 518.

[59] Id. at ¶ 521.

[60] Id. at ¶ 516.

incumbent LEC "must provide, upon request, nondiscriminatory access to operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements . . . no later than January 1, 1997."[61] Any BOC that is not fully in compliance with this directive cannot be deemed to have satisfied the "competitive checklist."

Another key principal associated with "competitive checklist" compliance is that the BOCs may not always rely upon multiple agreements to satisfy the "competitive checklist," and may never rely upon a SGATC to "fill in the gaps" in their "competitive checklist" compliance showing. Two points are critical here. First, as discussed in detail in a preceding section of this submission, "Track A" and "Track B" constitute mutually exclusive vehicles by which a requesting BOC may justify a grant to it of "in-region," interLATA authority. As TRA has explained, a BOC seeking "in-region," interLATA authority may proceed under either "Track A" or "Track B", but not both. Moreover, a BOC may not proceed under "Track B," once "Track A" has been triggered by a new market entrant's request to interconnect its network facilities with the network facilities of the BOC. Thus, once a request for network access/interconnection is made, a BOC may not demonstrate "competitive checklist" compliance" in partial reliance upon a SGATC.

Second, a BOC may not demonstrate "competitive checklist" compliance in reliance upon multiple network access/interconnection agreements, none of which individually fully implements all fourteen elements, unless new market entrants can also select individual provisions from among multiple agreements. Section 252(i) requires incumbent LECs to make available "any interconnection, service or network element provided under an agreement approved

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[61] Id. at ¶ 525.

under . . . [Section 252] to which it is a party to any requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[62] The Commission read Section 252(i) to "support[] requesting carriers' ability to chose among individual provisions contained in publicly filed interconnection agreements," and to entitle any requesting carrier to "avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission."[63]

If the Commission's "mix-and-match" approach prevails either in a given State or on a national level, BOCs should generally be entitled to rely upon multiple agreements to demonstrate "competitive checklist" compliance because all new market entrants would be able to secure all fourteen "competitive checklist" items even if these elements were spread across multiple agreements. If, however, Section 252(i) is read to merely permit new market entrants to take network access/interconnection agreements in their entirety or not at all, denying requesting carriers the opportunity to "mix and match" provisions from multiple agreements, then BOCs should likewise be required to demonstrate "competitive checklist" compliance through single agreements. Absent "mix and match" opportunities and "most-favored-nation" rights, the fourteen "competitive checklist" items would not be readily available to all requesting carriers if spread among multiple agreements and hence would not be "fully implemented." Indeed, an argument could be made that "competitive checklist" compliance cannot be achieved under

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[62] 47 U.S.C. § 252(i).

[63] Local Competition First Report and Order, FCC 96-325 at ¶¶ 1310, 1316.

"Track A" if "mix and match" opportunities and "most-favored-nation" rights are not provided because of "practical concerns" identified by the Commission:

> [F]ailure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement.[64]

The final item associated with "competitive checklist" compliance is the broad criteria that the fourteen elements provided or offered, as appropriate, must be provided or offered in compliance with the directives of the 1996 Act and the Commission's implementing rules and policies. The various "competitive checklist" items, accordingly, must be provided or offered on rates, terms and conditions that are just, reasonable, nondiscriminatory and consistent with Congressional and Commission mandates. Services and facilities must also be of a quality equal or better than that the BOC provides to itself or its affiliates.

3. Compliance with Regulatory Safeguards

Section 272(d)(3)(B) requires a demonstration by the requesting BOC that the "in-region," interLATA authorization it seeks will be "carried out in accordance with the requirements of Section 272."[65] As the Commission has recognized, "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."[66] Noting that "BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for

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[64] Id. at ¶ 1312.

[65] 47 U.S.C. § 271(d)(3)(B).

[66] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, FCC 96-489 at ¶ 10.

approximately 99.1 percent of the local service revenues in those markets,"[67] the Commission elaborated on its concerns:

> "If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above."[68]

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[67] Id. (footnote omitted).

[68] Id. at ¶¶ 10 - 12.

Accordingly, demonstrated compliance with both the 1996 Act's and the Commission's accounting safeguards, including rules governing affiliate transactions and cost allocations, and non-accounting separate affiliate and nondiscrimination safeguards is imperative.[69] As the Commission has acknowledged, vigilant and vigorous enforcement is of vital enforcement during the transition from monopoly to competition.[70] That enforcement should incorporate the imposition of a heavy burden on a BOC seeking "in-region," interLATA authority to show that it has established all structures, procedures and processes necessary to ensure full compliance with Section 272 as a precondition to grant of the requested authority.

4. The Public Interest, Convenience and Necessity

The final evaluative task assigned to the Commission under Section 272(d)(3) is the determination whether grant of the "in-region," interLATA authorization sought by the requesting BOC would be "consistent with the public interest, convenience, and necessity.[71] The public interest standard is a necessarily broad test incorporating a host of considerations. A critical element of a public interest analysis involving market entry, of course, is the competitive impact of such entry.[72] TRA submits that the inclusion of a public interest test among the Commission's evaluative requirements reflects a Congressional mandate that the Commission assess the impact of BOC provision of "in-region," interLATA service on both nascent local and

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[69] Id. at Appx. B; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order), 11 FCC Rcd. 17539, Appx B (Dec. 24, 1996).

[70] Local Competition First Report and Order, FCC 96-325 at ¶ 20.

[71] 47 U.S.C. § 271(d)(3)(C).

[72] *See, e.g.,* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 - 91 (1953).

existing long distance competition. Certainly, the public interest test is not a license for the Commission to reduce or expand the "competitive checklist;" Section 271(d)(4) makes this clear.[73] Congress clearly intended a more "macro" analysis involving a broad assessment of competitive and consumer impacts.

It is TRA's strongly-held belief that the public interest would not be served by authorizing BOC provision of "in-region," interLATA service within a given State until such time as consumers in at least the five largest metropolitan areas within that State are able to select among two or more established facilities-based providers of local exchange/exchange access service and interstate switched access charges have been reduced to reflect the economic cost of originating and terminating long distance traffic. By established facilities-based providers, TRA is referring to competitive local exchange carriers that are, and have been for some modicum of time, operational and are providing dial tone and other local services to a significant number of customers. Actual customers are a critical element because a provider's ability to attract customers is a demonstration of its and its service's operational viability, which in turn confirms the BOC's compliance with the 1996 Act's mandate that services and facilities provides a new market entrant must be at least of equal quality to that the BOC provides itself. Market share, while not a perfect indicator, is a useful guage of the viability of competition in a market.[74]

As monopoly or near monopoly providers of local exchange/exchange access service, the BOCs retain the ability to (i) hinder competitive entry into local markets; (ii)

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[73] 47 U.S.C. § 271(d)(4). It is noteworthy that a proposed amendment that would have eliminated the public interest test because it was duplicative of the "competitive checklist" was soundly defeated by the Senate. Cong. Rec. 57960 - 7971 (daily ed. June 8, 1995).

[74] *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

undermine the competitive viability of new entrants into the local market; and (iii) adversely impact existing providers of interLATA service. The BOCs will retain the ability to impede local, and diminish long distance, competition so long as they retain control of local "bottleneck" facilities. This ability to act anticompetitively will diminish only when competitive providers of local exchange/exchange access service who are not dependent upon BOC network services establish a solid competitive foothold, thereby eroding the local "bottleneck." Until a BOC's control of "bottleneck" facilities no longer encompasses the larger part of the population of a State, authorizing the BOC to originate interLATA service within that State would not only not serve, but would be directly contrary to, the public interest. Such a premature action would deny the residents of the State not only the potential benefits of local exchange/exchange access competition, but reduce the existing benefits to those consumers of long distance competition.

The telephony provisions of the 1996 Act are designed, among other things, to open the monopoly local exchange/exchange access markets to competitive entry, eliminating "not only statutory and regulatory impediments to competition, but economic and operational impediments as well."[75] It belabors the obvious, however, to state that an order of magnitude difference exists between theoretically "contestable" and actually "contested" markets. While competitive potential may ultimately evolve into actual competition significant enough to discipline BOC market power, the lag in time before competition actually emerges may, and likely will, be substantial. And this lag in time will be exacerbated by BOC resistance to competitive entry and the competitive provision of local exchange and exchange access service. As succinctly put by the Commission:

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[75] Local Competition First Report and Order, FCC 96-325 at ¶ 3.

> We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power.[76]

As noted previously, monopolists do not readily relinquish market power. As the Commission has recognized, "b]ecause an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."[77] BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local market. History teaches that the BOCs will actively seek as a profit maximizing strategy to forestall competition by interposing these barriers. TRA submits that BOC market conduct will be adequately disciplined only when local dial tone can be obtained from other facilities-based providers with proven competitive capabilities, and that the only incentive strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services.

TRA believes that the experience of its resale carrier members in dealing with AT&T in the long distance market is instructive here. When non-facilities based or "switchless" resale was born in the late 1980s, AT&T possessed a market share in the range of seventy-five percent; MCI's market share was roughly ten percent, with Sprint lagging behind at around six

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[76] Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, 11 FCC Rcd. 14028, ¶ 130 (released Feb. 15, 1996).

[77] Local Competition First Report and Order, FCC 96-325 at ¶ 10.

percent.[78] During the following decade, AT&T lost more than a quarter of its market share, while MCI and Sprint increased their market shares by more than fifty percent and WorldCom, Inc. ("WorldCom") seized five percent of the market.[79] During this interim period, the dealings of TRA's resale carrier members with AT&T were marred by persistent and substantial anticompetitive abuses, while MCI generally declined to provide service to resale carriers.[80] Only Sprint and WilTel, Inc. ("WilTel") aggressively sought the business of resale carriers and structured their operating systems to accommodate resale. It has only been of late that AT&T

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[78] Long Distance Market Shares (Third Quarter 1996), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (Jan. 15, 1997).

[79] Id.

[80] A survey by TRA of its resale carrier members in 1994 showed that anticompetitive abuses were limited almost exclusively to AT&T. Thus, for example, nearly 80 percent of respondents identifying AT&T as their long distance network provider reported that AT&T had used their confidential and proprietary information to solicit their customers, indicated that such abuses occurred "very frequently," "frequently" or "regularly" and were "very serious" or "serious," and confirmed that they had lost a "large number" or a "medium number" of customers as a result of such abuses. For all the rest of the long distance network providers combined, there were only two reports of "frequent" or "regular" abuse and only three reported instances of "very serious" or "serious" abuses and "large numbers" or "medium numbers" of lost customers. With respect to service provisioning, TRA's survey revealed similar discrepancies among AT&T and the other long distance network providers. Thus, survey respondents reported that, with rare exceptions, most network providers provisioned service orders within fifteen days, with the large majority of orders being processed within ten days. In contrast, the vast majority of respondents who used AT&T reported provisioning intervals for outbound service of between sixteen days and more than one hundred and twenty days, with delays generally in the sixteen to sixty day range. With respect to "800" service, more than two thirds of the AT&T respondents reported delays of twenty-six days or more, ranging upward to one hundred and twenty days. Likewise, the survey revealed that AT&T rejected upwards to six times the number of service orders rejected by other long distance network providers. As a result, a majority of the survey respondents identifying AT&T as their network provider characterized "jamming" as a "very serious" or "serious" problem, while among respondents who identified other carriers as their network providers only a small handful so characterized "jamming." Yet another example of anticompetitive abuse relates to incomplete, inaccurate or untimely call detail reporting. Of the survey respondents identifying AT&T as their network provider, more than two thirds reported that "unbilled toll" remained a problem, while less than twenty percent of all other respondents so indicated. Not surprisingly, the vast majority of survey respondents that utilized AT&T as their network provider described their relationship with AT&T as "poor" or "fair," while the overwhelming majority of respondents who used the networks of Sprint or WilTel rated their relationships with these carriers as "good," "very good" or "excellent," with the greatest number rating their relationships "very good."

has begun to view resale carriers as the large, desirable customers the FCC perceived them to be in 1991.[81]

As the dominant player in the long distance market, AT&T had the ability and the incentive to act in an anticompetitive manner toward resale carriers. After all, seven out of every ten customers acquired by resale carriers were previously AT&T customers. In sharp contrast, Sprint and WilTel had a strong economic incentive to deal with resale carriers. More than nine out of every ten customers resale carriers placed on the Sprint network had been customers of Sprint's long distance competitors and WilTel had positioned itself in the market as a wholesale provider. As a result, Sprint and WilTel welcomed resale carriers and actively worked to enhance service provisioning, billing and security to benefit resale carriers, while AT&T abused its forced relationship with resale carriers, acting to affirmatively undermine their competitive viability. Only when AT&T's market share approached 50 percent and the other facilities-based providers had achieved a strong market position did AT&T begin to reform its conduct with respect to resale carriers. Other earlier offered incentives, such as price cap regulation or reclassification as a nondominant carrier, had proven to be insufficient to incent such reformation.

History will soon repeat itself in the local market. Like AT&T, the BOCs will attempt to thwart competition by anticompetitive abuse of market power, however, their ability

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[81] Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates."). The Commission was correct in one respect, resale carriers are among the largest purchasers of interexchange services in the Nation. For example, the resale carriers listed in the FCC's report of long distance market share provide billions of dollars in revenues annually to long distance network service providers. Long Distance Market Shares (Third Quarter 1996) at Table 6.

and incentives to do so will be greater than AT&T's both because their market share is substantially larger and their control of essential facilities is far more pervasive. While the Commission has recognized that the "transition from monopoly to competition" will not be an easy one and has promised "swift, sure and effective" enforcement of the rules adopted to open local markets to competition, it has nonetheless acknowledged that in the event that it fails in its enforcement responsibilities, "the actions [taken] . . . to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective."[82]

The obvious answer is to await the emergence of meaningful facilities-based competition prior to authorizing BOC provision of "in-region, interLATA service. In TRA's view, the public interest demands no less.

D. Southwestern Bell's Application is Fatally Deficient in Multiple Respects

Applying the above standards, Southwestern Bell's Application is plagued by a number of flaws, many of which are fatal to the Application's viability. As noted early-on, the Commission may not grant a BOC application for "in-region," interLATA authority unless it makes an affirmative determination (i) that the applying BOC has met the requirements of Section 271(c) for the State for which authorization is sought, (ii) that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section 272, and (iii) that grant of the requested "in-region," interLATA authority is consistent with the public interest, convenience and necessity.

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[82] Local Competition First Report and Order, FCC 96-325 at ¶ 20.

Southwestern Bell's effort to demonstrate compliance with Sections 271(c)(1) and (c)(2)(B) is limited to its SGATC and a network access/interconnection agreement entered into with Brooks Fiber Communications of Oklahoma and Brooks Fiber Communications of Tulsa (collectively "Brooks Fiber").[83] As Southwestern Bell acknowledges, it has received requests from multiple new market entrants seeking to interconnect their network facilities with the network facilities of Southwestern Bell over the past year.[84] Southwestern Bell, accordingly, is foreclosed from relying upon "Track B" and, therefore, must proceed under "Track A."[85] Thus, Southwestern Bell cannot rely on its SGATC to demonstrate compliance with Section 271(c).

Neither can Southwestern Bell rely on the Brooks Fiber network access/interconnection agreement to demonstrate Section 271(c) compliance under "Track A." First, and most critically, Brooks Fiber, as demonstrated by the Association for Local Telecommunications Services ("ALTS") in their "Motion to Dismiss and Request for Sanctions," filed in this proceeding on April 23, 1997, does not satisfy one of the basic requirements of "Track A." Southwestern Bell's representations to the contrary notwithstanding, Brooks Fiber does not provide commercial service to both business and residential customers in the State of Oklahoma using its own facilities; indeed, it does not provide residential service at all, other than on a test basis to a handful of its employees and then only through resale of Southwestern Bell services.

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[83] Southwestern Bell Brief in Support at 8 - 15.

[84] Indeed, Southwestern Bell trumpets that it has entered into "89 interconnection agreements," 16 of which relate to Oklahoma and 6 of which have been approved by the Oklahoma Corporation Commission. Id. at 3 - 4.

[85] *See* Section II.B.1, *infra*

As attested to by John C. Shapleigh, Executive Vice President - Regulatory and Corporate Development, Brooks Fiber Properties, Inc., "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma."[86] Moreover, Mr. Shapleigh has explained that "Brooks is not accepting any requests in Oklahoma for residential service" because "necessary facilities are not yet available."[87] While "Brooks is currently testing resale systems offered by SBC by running test circuits into the homes of four Brooks employees in Oklahoma," Mr. Shapleigh further noted, "[t]he employees involved do not pay for the test circuit 'service'."[88] Accordingly, Southwestern Bell is also precluded from proceeding under "Track A."[89]

The Brooks Fiber network access/interconnection agreement also fails to provide a viable "Track A" vehicle for a host of other reasons. As acknowledged by Southwestern Bell, Brooks Fiber furnishes local dial tone in only two locales within the State of Oklahoma -- *i.e.,* Tulsa and Oklahoma City.[90] Moreover, Brooks Fiber, again according to Southwestern Bell, serves only 21 business customers within the State of Oklahoma.[91] This hardly represents the broad geographic coverage and the critical mass of subscribers necessary to represent established facilities-based competition.[92] Further, Brooks Fiber, again as described by Southwestern Bell,

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[86] ALTS Motion to Dismiss, Shapleigh Affidavit at 1.

[87] Id.

[88] Id.

[89] *See* Section II.B.2.a, *infra.*

[90] Southwestern Bell Brief in Support at 9.

[91] Id. at 11.

[92] *See* Sections II.B.2.a & II.B.2.e, *infra.*

serves the large majority of its customers using T-1 circuits leased from SWBTC as local loops.[93] Because it does not utilize is own subscriber loop facilities, and indeed, leases these lines from Southwestern Bell, Brooks Fiber does not offer exchange service "predominantly over . . . [its] own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[94]

Nor has Southwestern Bell fully implemented the Brooks Fiber network access/interconnection agreement and eliminated all capacity and quality constraints. Again, as attested to by Mr. Shapleigh;

> Facilities are currently unavailable to Brooks in Oklahoma for provisioning residential service because: (1) unbundled loops cannot be utilized prior to completion of collocation arrangements and establishment of final pricing rules for unbundled loops at reasonable rates; and (2) Brooks has not gained enough experience with SBC's resale systems to determine whether Brooks can effectively use them on even an ancillary basis.[95]

Accordingly, Southwestern Bell cannot be deemed to be "providing access and interconnection pursuant to [the Brooks Fiber network access/interconnection agreement]."[96]

Finally, Southwestern Bell insists on incorporating into its agreements provisions which would allow it to unilaterally eliminate rights of the new market entrant based upon subsequent regulatory, legislative or judicial action, thereby rendering the agreements less than fully binding.[97] An example of such a reservation of right is as follows:

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[93] Southwestern Bell Brief in Support at 11.

[94] *See* Sections II.B.2.b & II.B.2.c, *infra*

[95] ALTS Motion to Dismiss, Shapleigh Affidavit at 1.

[96] *See* Sections II.B.2.d & II.B.2.e, *infra*

[97] *See* Sections II.B.2.d, *infra*

> At the time of execution of this Agreement, SWBT had participated in Docket Nos. 16189, 16196, 16226, 16285 and 16290 (the "Consolidated Arbitration") before the Commission. The Parties have included certain rates, terms and/or conditions in this Agreement which reflect rates, terms and/or conditions established in the Consolidated Arbitration and contained in one or more agreements approved by the Commission. LSP acknowledges that any negotiations, appeal, stay, injunction or similar proceeding impacting the applicability of those rates, terms and/or conditions to other Local Service Provider(s) will similarly impact the applicability of those rates, terms and/or conditions to LSP (Collectively "Appeals"). If LSP is not eligible to receive one or more rates, terms and/or conditions at any time due to such Appeals, the Parties agree that SWBT shall substitute the most favorable rate(s), terms and conditions applicable to LSP's activities then in place from an interconnection agreement which has been approved by the Commission.
>
> Moreover, if the actions of the Texas or federal legislative bodies, courts or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis of the provision of the contract which is reflective of the Consolidated Award, the affected provision shall be invalidated, modified or stayed.

Southwestern Bell's "competitive checklist" compliance is also sorely lacking. Many of the items on the 14-point "competitive checklist" are far from "fully implemented," and those that are, are often not of equal quality to those offered by Southwestern Bell to its own customers.[98] For example, with respect to interconnection, Southwestern Bell continues to "slow-roll" collocation arrangements and persists in restricting both the types of trunks that competitive LECs can use and the types of traffic that competitive LECs can be combined on trunk groups. In dealing with unbundled network elements, Southwestern Bell in some instances restricts the ability of competitive LECs to combine unbundled network elements to reproduce Southwestern Bell retail services and has yet to fully test and implement operational support systems for

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[98] *See* Sections II.B.3, *infra*.

unbundled network elements which can accommodate large volume usage. Moreover, Southwestern Bell imposes on competitive LECs as a precondition to ordering unbundled network elements the enormous obligation of securing from its many third party vendors licenses or right-of-use agreements.[99]

Another example of Southwestern Bell's failure to fully implement the "competitive checklist" is its failure to implement interim number portability solutions which limit, to the extent technically feasible, the adverse service quality impacts occasioned by "porting" a number to a competing LEC. With respect to resale, Southwestern Bell still imposes restrictions on a competing LEC's ability to aggregate traffic from multiple end users, as well as continuous property restrictions.[100] Moreover, Southwestern Bell is imposing large nonrecurring charges in

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[99] Indeed, this requirement is incorporated into Southwestern Bell's SGATC at ¶ 6:

> LSP acknowledges that its rights under this contract to interconnect with SWBT's network and to unbundle and/or combine SWBT's network elements (including combining with the LSP's network elements) may be subject to or limited by intellectual property (including, without limitation, patent, copyright and trade secret rights) and contract rights of third parties. It is the sole obligation of LSP to obtain any consents, authorizations, or licenses under intellectual property or proprietary rights held by third parties that may be necessary for its use of SWBT network facilities under this Agreement. SWBT hereby conveys no licenses to use such intellectual property rights and makes no warranties, express or implied, concerning LSP's (or any third party's) rights with respect to such intellectual property and contract rights, including, without limitation, whether such rights will be violated by such interconnection or unbundling and/or combining of elements (including combining with the LSP's network elements) in SWBT's network. SWBT does not and shall not indemnify or defend, nor be responsible for indemnifying or defending, LSP for any liability losses, claims, costs, damages, demand, penalties or other expenses arising out of, caused by or relating to LSP's interconnection with SWBT's network and unbundling and/or combining SWBT's network elements (including combining with the LSP's network elements).

[100] *See, e.g.,* Southwestern Bell's SGATC at Appx. RESALE, ¶¶ 2.3, 2.4.

a number of its "in-region States," which assessments constitute a substantial impediment to market entry by smaller providers. Thus, for example, Southwestern Bell often assesses non-recurring charges for call-branding, directory assistance and operator services in the many thousands of dollars.

Finally, Southwestern Bell has not made, and could not make, the public interest showing demanded by Section 271(d)(3)(C). Simply put, Southwestern Bell is not now facing meaningful facilities-based (or for that matter, non-facilities-based) competition in the State of Oklahoma. While Southwestern proclaims that the local exchange/exchange access market in the State of Oklahoma is now "contestable," it can only point to Brooks Fiber with its 21 business customers in two metropolitan areas as an actual facilities-based competitor. Otherwise, Southwestern can only cite to regulatory certifications being granted and network access/interconnect agreements being signed, as well as the old tried and true wireless and CATV threats, in an effort to paint a picture of looming competition.[101]

If it is awarded the "in-region," interLATA authority it seeks here, Southwestern Bell would no longer have any incentive to facilitate competitive entry into the local exchange/exchange access markets within the State of Oklahoma; indeed, it would be incented to forestall such competitive entry. Consumers and competitors alike would suffer as a result.

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[101] Southwestern Bell Brief in Support at 91 - 95.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to deny the Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for authority for SWBLD to provide interLATA services "originating" within the SWBTC "in-region State" of Oklahoma. As demonstrated by TRA above, Southwestern Bell has failed to satisfy the requirements for providing "in-region," interLATA service set forth in Section 271(c), and has not shown that the authorization it requests is consistent with the public interest, convenience and necessity, as required by Section 271(d)(3).

Respectfully submitted,

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May 1, 1997

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CERTIFICATE OF SERVICE

I, Marie E. Kelley, do hereby certify that I have this 1st day of May, 1997, caused copies of the foregoing comments to be served by United States First Class Mail, postage prepaid, upon the individuals following individuals.

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